COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 41439-00**

Morris E. Davis	Employee
P.A. Frisco, Inc.	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Horan)

APPEARANCES
Michael C. Akashian, Esq., for the employee
Mark H. Likoff, Esq., for the insurer

McCARTHY, J. The parties cross-appeal a decision in which an administrative judge, in an amendment, dated April 22, 2004, to his decision of February 26, 2004, awarded the employee a closed period of partial incapacity benefits at the maximum rate under § 35. The insurer challenges the authority of the judge to reopen the case and issue such an amendment, which extended the termination date of the original award of § 35 benefits from February 6, 2002, the date of the impartial examination, to February 26, 2004, the filing date of the decision.[1] We agree that such action was contrary to law. In so concluding, we hereby overrule our decision in Howard v. Beacon Constr., 11 Mass. Workers' Comp. Rep. 290 (1997). The employee challenges the decision(s), arguing that the judge performed an insufficient incapacity analysis. We agree with that argument in part. Therefore, we recommit the case, which must result in a de novo hearing, as the judge no longer serves with the department.

[1] In its brief on appeal, the insurer argues that the "amended decision" should be disregarded as being outside the powers of the administrative judge (Insurer brief at 12) and the decision dated February 26, 2004 "be upheld." (Insurer brief at 15).

The employee suffered an injury to his right ankle while working as a pile driver on September 29, 2000. (Dec. 3.)[2] The insurer accepted the injury[3] (Dec. 2) and paid § 34 benefits. Later it reduced its payments to maximum weekly partial § 35 benefits based on a treating doctor's opinion that the employee could work light duty. (Dec. 3.) The insurer's request to further reduce payment of benefits was denied at the § 10A conference, and the insurer appealed to a full evidentiary hearing. (Dec. 1-2.)

The employee underwent an impartial medical examination on February 6, 2002. The doctor opined that the employee sustained a fracture of the distal fibula as a result of his work injury, which should have healed within 6-12 weeks. The doctor considered it somewhat surprising that the employee was experiencing pain and numbness 18 months post-injury, as there was no sign of nerve damage. The doctor opined that the employee's disability was partial, but that he could perform full time work, so long as it did not involve running, repetitive heavy lifting or carrying, or very heavy lifting. The judge adopted the doctor's opinions. He also credited the employee's testimony regarding his physical limitations due to his right ankle. (Dec. 5-6.)

The judge concluded that the employee could not return to his job as a pile driver, and awarded him partial incapacity benefits from the date of injury to February 6, 2002, the date of the impartial examination. (Dec. 6, 8.) The employee timely appealed the decision on March 25, 2004, but, in an apparent answer to the employee's off-the-record entreaties, the judge issued an amended decision on April 22, 2004, extending the termination date for the § 35 award from February 6, 2002 to the filing date of the original decision, February 26, 2004. The insurer timely appealed that amended decision on May 19, 2004.

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[2] The decision to which we refer is the original decision filed on February 26, 2004.

[3] The decision is incorrect when it states: "The claim in this matter was not accepted and it came on for conference under § 10A of the Act on November 21, 2001." (Dec. 1.) The conference was on *the insurer's* complaint for modification or discontinuance of payments being made, *14 months after the September 29, 2000 date of injury*, which payments the insurer had been making voluntarily and continuously since that date of injury. (Insurer's brief at 4, Employee's brief at 1.)

The insurer challenges the judge's authority to issue the April 22, 2004 amended decision. We are hard-pressed to characterize the judge's action – whether it was a reconsideration, or reopening of the case – because the entire "proceeding" leading up to the issuance of the "amended" decision is not a matter of record.[4] However, there is no dispute that the parties and judge did, in fact, have some communication which resulted in the issuance of the amended decision. We agree with the insurer that the judge had lost the authority to take such action as the employee had already appealed the February 26, 2004 decision to the reviewing board.

The reviewing board decided this issue to the contrary in Howard v. Beacon Constr., 11 Mass. Workers' Comp. Rep. 290 (1997). In that case, a majority of the three judge panel concluded that an administrative judge had the authority to reopen the evidentiary record in an employee's claim for benefits, more than two months after the employee had appealed the judge's decision on her claim to the reviewing board. Id. at 291, 292. As noted in the dissent, "[t]he reviewing board clearly had jurisdiction of the case under § 11C when the motion to reopen was filed. Chapter 152 makes no provision for concurrent jurisdiction and creating it by case law invites procedural chaos into our dispute resolution system." Id. at 292. The dissent continued: " 'Though its main purpose is to do justice, a lawsuit cannot be an endless search for absolute truth. The interests of the public and of the parties require that litigation end after both parties have had reasonable opportunity to present their evidence and arguments.' " Id., quoting Long v. George, 296 Mass. 574, 579 (1937).

The fact that the judge in the present case did not issue a decision until approximately *one and one half years* after the close of the evidence is no reason to extend the authority of the judge to reopen the claim after an appeal has been taken to the reviewing board. Once again, because none of the dealings between the parties and the

[4] Once again, we are confronted with another example of the failure "to conduct all but the most extraneous of trial business on the record." Hill v. Dunhill Staffing Sys., Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002), quoting Murphy v. City of Boston School Dept., 4 Mass. Workers' Comp. Rep. 169, 173 n.8 (1990).

judge on this matter were on the record, we cannot comment on the reasons behind the action. Suffice it to say, however, that the administrative judge did not retain jurisdiction over the case after the appeal had been filed, and his reopening or reconsideration of the claim to render a new order of benefits under those circumstances was contrary to law. § 11C. We today adopt the rule set out in the dissent to Howard, supra: there is no concurrent jurisdiction between the administrative judge and the reviewing board. "Once a party enters an appeal . . . the court issuing the judgment or order from which an appeal was taken is divested of jurisdiction to act on motions to rehear or vacate." Commonwealth v. Cronk, 396 Mass. 194, 197 (1985). See also Commonwealth v. Montgomery, 53 Mass. App. Ct. 350, 352-353 (2001).[5] Accordingly, we vacate the amended decision, issued on April 22, 2004.

Turning to the judge's original decision filed February 26, 2004, we see that it is bereft of findings which would support the termination of the employee's weekly benefits as of the date of the impartial medical examination on February 6, 2002. The judge concluded that the employee was "partially disabled." (Dec. 7.) In doing so he credited the employee's testimony as to his limitations on activities involving his right ankle and foot. (Dec. 4.) He also noted the impartial medical examiner's opinion that the employee was ready to return to his work as a pile driver.[6] Finally, he found "the employee's testimony that he can no longer perform the work as a pile driver credible and reliable." (Dec. 6.) These inconsistent findings obscure the judge's reasons for terminating benefits as of the date of the impartial examination.

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[5] Under appropriate circumstances, the reviewing board may allow a party to return to the administrative judge for further proceedings. However, the proper action to take in such a case, is to move to stay the appeal before the reviewing board. Montgomery, supra at 353-354. We express no opinion in this case as to whether that action on the part of the employee would have been appropriate and successful, as we have no idea as to what was behind the invalid reopening of this case.

[6] The judge did not expressly adopt this finding, even though it constituted prima facia evidence. § 11A(2).

Accordingly, we also vacate the original decision in part and recommit the case for a de novo hearing on the employee's claim of incapacity from February 6, 2002 onward. As the judge who heard and decided the case no longer serves as such, the case must be assigned to a different administrative judge.[7]

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***November 18, 2004***

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

[7] We summarily affirm the judge's assignment of a weekly earning capacity of $238.19 from the filing date of the complaint for termination or modification of weekly benefits until February 6, 2002. See Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp. Rep. 354 (1995).